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Supreme Court of the United States

MICHAEL RODAK, JR., CLERK

October Term, 1976

No. 76-194

THE HONORABLE GEORGE W. WHITE, Judge of the
Court of Common Pleas of Cuyahoga County,
Appellant,

vs.

THE STATE OF OHIO on Relation of JOHN T.
CORRIGAN, Prosecuting Attorney of Cuyahoga
County, Ohio,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OHIO

JURISDICTIONAL STATEMENT

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Supreme Court of the United States**October Term, 1976****No. _____**

THE HONORABLE GEORGE W. WHITE, Judge of the
Court of Common Pleas of Cuyahoga County, Ohio,
Appellant,

vs.

THE STATE OF OHIO on Relation of JOHN T.
CORRIGAN, Prosecuting Attorney of Cuyahoga
County, Ohio,
Appellee.

**ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OHIO**

JURISDICTIONAL STATEMENT**OPINIONS BELOW**

The opinion of the Supreme Court of the State of Ohio is reported at 46 Ohio St. 2d 29, 346 N.E.2d 289 (1976), and is attached as an appendix hereto, as is that court's unreported decision denying appellant's motion for rehearing (Appendix A). The appellant's unreported opinions, as recorded in the Journal of the Court of Common Pleas of Cuyahoga County, Ohio, are attached as appendices hereto (Appendix A).

JURISDICTIONAL GROUNDS

This case was instituted by a petition for a writ of mandamus brought by the appellee in the Supreme Court of Ohio, under that court's jurisdiction as granted by OHIO CONST., Art. IV, §2(B)(1)(b). The statutory prerequisites under which the action was brought are set forth in OHIO REV. CODE ANN., §2731.02, §2731.03 and §2731.05 (Page's, 1954) (Appendix C).

The Supreme Court of Ohio rendered judgment in favor of the appellee, allowing the issuance of a writ of mandamus, on April 21, 1976, and the appellant's motion for a rehearing was denied on May 13, 1976. Notice of this appeal was filed in the Supreme Court of Ohio on May 26, 1976 (Appendix A).

The instant case comes to this Court pursuant to Title 28 U.S.C. §1257(2) (Appendix B), which grants jurisdiction over cases . . .

. . . where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

With regard to the first question presented, the constitutional validity of OHIO CONST., Art. IV, §1 and OHIO R. CRIM. P. 52(B) (Page's, 1975) (Appendix C), as interpreted by the Supreme Court of Ohio, are challenged.

The following cases support this Court's jurisdiction over this issue:

Kalb v. Feuerstein, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940)

Great Northern Ry. Co. v. Sunburst Oil & Refining Co., 287 U.S. 358, 53 S. Ct. 145, 77 L. Ed. 360 (1932).

Brinkerhoff-Faris Trust & Savings Co. v. Hill, 281 U.S. 673, 50 S. Ct. 451, 74 L. Ed. 1107 (1930).

Missouri ex rel. Missouri Insurance Co. v. Gehner, 281 U.S. 313, 50 S. Ct. 326, 74 L. Ed. 870 (1930).

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S. Ct. 61, 73 L. Ed. 184 (1928).

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921).

Corn Products Refining Co. v. Eddy, 249 U.S. 427, 39 S. Ct. 325, 63 L. Ed. 689 (1919).

Saunders v. Shaw, 244 U.S. 317, 37 S. Ct. 638, 61 L. Ed. 1163 (1917).

Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S. Ct. 625, 59 L. Ed. 1027 (1915).

With regard to the second question presented, the constitutional validity of OHIO REV. CODE ANN. §2911.11(A) (3) (Page's, 1975) (Appendix C) is challenged. The following cases support this Court's jurisdiction over this issue.

Kalb v. Feuerstein, 308 U.S. 433, 60 S. Ct. 343, 84 L. Ed. 370 (1940).

New York ex rel. Bryant v. Zimmerman, 278 U.S. 63, 49 S. Ct. 61, 73 L. Ed. 184 (1928).

Dahnke-Walker Milling Co. v. Bondurant, 257 U.S. 282, 42 S. Ct. 106, 66 L. Ed. 239 (1921).

Corn Products Refining Co. v. Eddy, 249 U.S. 427, 39 S. Ct. 325, 63 L. Ed. 689 (1919).

Coe v. Armour Fertilizer Works, 237 U.S. 413, 35 S. Ct. 625, 59 L. Ed. 1027 (1915)

STATUTES IN ISSUE

The constitutional validity of OHIO CONST., Art. IV, §1 and OHIO R. CRIM. P. 52(B) (Page's, 1975) (Appendix C), as interpreted by the Supreme Court of Ohio, are herein challenged as they conflict with the UNITED STATES CONST., Art. VI, cl. 2 (Appendix B).

The constitutional validity of OHIO REV. CODE ANN. §2911.11(A)(3) (Page's, 1975) (Appendix C) is challenged herein, as that subsection relates to OHIO REV. CODE ANN. §2911.12(A) and §2909.01 (Page's, 1975) (Appendix C), under the equal protection clause of the Fourteenth Amendment (Appendix B).

QUESTIONS PRESENTED

I. Whether OHIO CONST., Art. IV, §1 and OHIO R. CRIM. P. 52(B) (Page's, 1975) can be construed by the Supreme Court of Ohio so as to contravene the express mandate of the supremacy clause of the United States Constitution, UNITED STATES CONST., Art. VI, cl. 2, by prohibiting a judge of the Common Pleas Court of Ohio from *sua sponte* noticing and remedying constitutional error of the first magnitude during a criminal trial over which he is presiding.

II. Whether OHIO REV. CODE ANN. §2911.11(A)(3) (Page's, 1975) violates the equal protection clause of the Fourteenth Amendment to the United States Constitution, where that section, as it defines the crime of aggravated burglary, duplicates the prohibition contained in OHIO REV. CODE ANN. §2911.12(A) (Page's, 1975) (burglary), with the former provision carrying a heavier penalty than the latter, thus affording the state unfettered discretion in bringing more burdensome criminal sanctions against some accused than against others, for the very same conduct.

STATEMENT OF THE CASE

This case originated with indictments issued by the Grand Jury of Cuyahoga County, Ohio, against one Richard Kessler, for violations of OHIO REV. CODE ANN. §2911.11(A)(3) (Page's, 1975) (aggravated burglary) (Appendix A) and OHIO REV. CODE ANN. §2913.02 (Page's, 1975) (grand theft) (Appendix A). The defendant was tried before a jury and convicted on both counts in the Court of Common Pleas of Cuyahoga County, Ohio, the appellant, the Honorable George W. White, presiding.

At the time of sentencing, the appellant *sua sponte* reduced the first count of aggravated burglary (a first degree felony) to burglary, OHIO REV. CODE ANN. §2911.12(A) (Page's, 1975) (a second degree felony) and sentenced the defendant to a term of four to fifteen years (in addition to sentencing him pursuant to the conviction for grand theft). The penalty for a first degree felony in Ohio, under OHIO REV. CODE ANN. §2929.11(B)(1) (Page's, 1975) (Appendix C) is a minimum term of four, five, six or seven years to a mandatory maximum of twenty-five years. The penalty for a second degree felony, under §2929.11(B) (Appendix C), is a minimum term of two, three, four or five years to a mandatory maximum of fifteen years. This reduction of conviction is reflected in the appellant's original Journal Entry (Appendix A), while the appellant's reason for the reduction, the unconstitutionality of OHIO REV. CODE ANN. §2911.11(A)(3), under which the defendant was originally convicted, is set forth in some detail in the record of the sentencing hearing (Appendix D).

As a result of the above action of the appellant, the appellee, John T. Corrigan, Prosecuting Attorney of Cuyahoga County, Ohio, brought a petition for a writ of mandamus in the Supreme Court of Ohio, requesting that the

appellant be ordered to resentence the defendant pursuant to aggravated burglary.

The appellant answered the petition stating that he had acted pursuant to OHIO R. CRIM. PRO. 52(B) (Page's, 1975) (Appendix C), which directs trial judges to take notice of plain errors and to remedy those errors accordingly. Both parties submitted written briefs on the issue of the unconstitutionality of the relevant sub-section of the aggravated burglary statute, the appellant relying upon the duplication resulting between aggravated burglary and burglary, based on the definitions relating to those crimes found in OHIO REV. CODE ANN. §2909.01 (Page's, 1975) (Appendix C). The appellant took the position that this duplication of offense, with differing penalties, created a situation violative of the Fourteenth Amendment's equal protection clause. At no time during these proceedings did either party address the existence of the appellant's constitutional obligation under the supremacy clause to act in the above described manner.

On April 21, 1976, the Supreme Court of Ohio rendered its first decision in the instant case, *State ex rel. Corrigan v. White*, 46 Ohio St. 2d 29, 346 N.E.2d 289 (1976), wherein the issuance of the writ of mandamus was allowed. The essence of that unprecedented decision is as follows:

Crim. R. 52(B), which permits the court to notice plain errors or defects even though not brought to its attention, is also argued as authority. However, respondent's journal entry does not state any plain errors upon which he relies, nor does the record point to any possible error in the court proceedings, other than respondent's opinion that the definitions of aggravated burglary and burglary are not essentially different.

Respondent's contention of statutory duplication is not relevant, as the record fails to disclose the court's authority to modify the jury's verdict in this case.

Therefore, respondent, not having shown authority to modify the verdict, is under a clear legal duty to sentence according to the verdict returned by the jury. *State ex rel. Corrigan v. White*, supra, at 30.

As a result of the Ohio Supreme Court's decision, which did not challenge the appellant's constitutional duty, but merely questioned the sufficiency of the appellant's Journal Entry, the appellant issued a Supplemental Journal Entry (Appendix A), pursuant to OHIO R. CRIM. PRO. 36 (Page's, 1975) (Appendix C), which allows the trial court to correct "... errors in the record arising from oversight or omission . . . at any time". Because the appellant had previously been unaware of the specificity necessary for the formulation of a proper Journal Entry, he went to great lengths to satisfy the Supreme Court of Ohio's new requirement that the procedural authority for his action be cited with precision in the Journal Entry, detailing his reliance on OHIO R. CRIM. PRO. 52(B) (Page's, 1975), as well as the Fourteenth Amendment. This procedure in no way modified the substance of the appellant's action. Pursuant to this Supplemental Journal Entry, the appellant submitted a motion for rehearing to the Supreme Court of Ohio, with a brief in support which fully explained the legal basis for his actions, including reliance upon his obligation under the supremacy clause of the UNITED STATES CONSTITUTION, Art. VI, cl. 2, and the grant of judicial power to his court under OHIO CONST., Art. IV, §1.

The Supreme Court of Ohio denied the appellant's motion for rehearing on May 13, 1976 (Appendix A), de-

spite his compliance with that court's new requirement that OHIO R. CRIM. P. 52(B) (Page's, 1975) be specifically cited in his Journal Entry. That decision stands for the proposition that under OHIO CONST., Art. IV, §1 and OHIO R. CRIM. P. 52(B) (Page's, 1975), the appellant's duty under the supremacy clause, UNITED STATES CONST., Art. VI, cl. 2, cannot be carried out *sua sponte*.

Pursuant to Rule 10 of the Rules of this Court, on May 26, 1976, the appellant filed a notice of appeal (Appendix A), and a motion for stay of enforcement of mandate in the Supreme Court of Ohio. On May 28, 1976, the Supreme Court of Ohio granted a stay of its judgment for twenty (20) days, pending application to this Court for an indefinite stay. On June 10, 1976, this Court, per Mr. Justice Stewart, denied the appellant's application for further stay pending appeal. On July 15, 1976, the appellant resentenced Richard Kessler, in conformity with the mandate of the Supreme Court of Ohio to a period of four to twenty-five years for the aggravated burglary conviction (Appendix A).

SUBSTANTIALITY OF FEDERAL QUESTIONS

This appeal presents two federal questions for this Court's determination, one of which was raised by the parties below, the other having been raised by the decision of the Supreme Court of Ohio.

By its rulings, the lower court has denied the existence of the mandate of the supremacy clause, UNITED STATES CONST., Art. VI, cl. 2, by effectively holding that pursuant to OHIO CONST., Art. IV, §1 and OHIO R. CRIM. PRO. 52(B), a judge of the Court of Common Pleas cannot act *sua sponte* to remedy constitutional error.

The Supreme Court of Ohio originally found the appellant's Journal Entry to be defective in its content because it did not specifically state the procedural authority for his action, a decision without precedent. Subsequently that court refused to recognize the appellant's duty to act as he had upon submission of a Supplemental Journal Entry which met the new requirements of specificity in the Journal Entry, without changing the substance of the result.

OHIO CONST., Art. IV, §1 vests the judicial power of the State of Ohio in . . .

. . . a supreme court, courts of appeals (and) courts of common pleas. . . .

OHIO R. CRIM. P. 52(B) (Page's, 1975) provides that:

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

The effect of the decision rendered in the instant case by the Supreme Court of Ohio is to give the above-cited provisions of state law such a narrow interpretation that despite the clear and unalterable directive of the supremacy clause, which places upon the judges of the various state courts the obligation of ultimate fidelity to the United States Constitution, the appellant is incapable, under state law, of *sua sponte* carrying out that paramount constitutional duty. Such a proposition cannot meet constitutional muster, for the supremacy clause mandates that:

This constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding. UNITED STATES CONST., Art. VI, cl. 2.

See, e.g., *Cooper v. Aaron*, 358 U.S. 1, 16-19, 78 S. Ct. 1401, 3 L. Ed. 2d 5 (1958).

Thus, although this issue was not initially addressed by either party, the original decision of the Supreme Court of Ohio, in conjunction with that Court's denial of appellant's motion for a rehearing, places this substantial federal question directly before this Court.

The second question presented by this appeal, the issue addressed by the parties in the proceedings below, is whether OHIO REV. CODE ANN. §2911.11(A)(3) (Page's, 1975) violates the equal protection clause of the Fourteenth Amendment, as that statute operates to duplicate the prohibition contained in OHIO REV. CODE ANN. §2911.12(A) (Page's, 1975). Where two criminal statutes both proscribe the very same conduct, with the same elements, and yet provide for different penalties, with unfettered discretion resting with the State as to which sanction to impose, the guarantees of the equal protection clause of the Fourteenth Amendment have been patently violated. *Yick Wo v. Hopkins*, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886); *State v. Zornes*, 469 P.2d 552 (Wash., 1970).

While the Supreme Court of Ohio in its initial decision in the instant case, claimed that it never reached the merits of this question, when the entire sequence of events leading up to this appeal is analyzed, it becomes clear that for purposes of this Court's jurisdiction, the issue was decided by the court below in favor of the validity of OHIO REV. CODE ANN. §2911.11(A)(3) (Page's, 1975).

The Supreme Court of Ohio initially held that the Fourteenth Amendment constitutional question was not decided because the appellant had not cited the authority for his action in his Journal Entry. As a result of this decision, the appellant remedied the omission and filed

a motion for rehearing which was denied, thus allowing the writ of mandamus, previously issued, to stand.

The effect of that writ is to order the appellant to sentence a defendant pursuant to a conviction under OHIO REV. CODE ANN. §2911.11(A)(3) (Page's, 1975), even though appellant himself had challenged the constitutionality of that statute. Despite the lower court's statement to the contrary in its initial opinion, a decision on the constitutional issue must have been reached, albeit *sub silencio*, in light of the Supreme Court of Ohio's decisions which prohibit the issuance of a writ of mandamus where such a writ would effect an unconstitutional result. See, e.g., *State ex rel. Kitchen v. Christman*, 31 Ohio St. 2d 64, 285 N.E.2d 362 (1972); *State ex rel. Janik v. Board of Elections of Lorain County*, 16 Ohio St. 2d 63, 242 N.E.2d 576 (1968). Since the state court saw fit, under Ohio law, to issue a writ of mandamus, it must have been of the opinion that the statute being challenged was constitutional. This, by definition, required a decision upon the merits of the appellant's initial claim.

Therefore, while stating in its opinion that the constitutional issue was never reached, and attempting to rest its decision upon independent state grounds, which themselves independently transgress the United States Constitution, the Supreme Court of Ohio in reality has addressed the original Fourteenth Amendment contentions of the parties, thus placing this substantial federal question squarely before this Court.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that this Honorable Court accept jurisdiction of the instant appeal.

Respectfully submitted,

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APPENDIX A

**Order of the Supreme Court of Ohio Issuing a Writ
of Mandamus**

(Dated April 21, 1976)

No. 75-1027

THE SUPREME COURT OF THE STATE OF OHIO
CITY OF COLUMBUS

STATE OF OHIO, ex rel.
JOHN T. CORRIGAN, Prosecuting Attorney,
Relator,

vs.

GEORGE W. WHITE, Judge,
Common Pleas Court,
Respondent.

IN MANDAMUS

This cause originated in this court on the filing of a complaint for a writ of mandamus and was considered in the manner prescribed by law. On consideration thereof, it is ordered by the court that the writ be allowed, for the reasons set forth in the opinion rendered herein.

Opinion of the Supreme Court of Ohio

(Dated April 21, 1976)

No. 75-1027

THE SUPREME COURT OF THE STATE OF OHIO
CITY OF COLUMBUS

STATE OF OHIO, ex rel.
JOHN T. CORRIGAN, Prosecuting Attorney,
Relator,
vs.
GEORGE W. WHITE, Judge,
Common Pleas Court,
Respondent.

IN MANDAMUS.

Respondent, a Judge of the Court of Common Pleas of Cuyahoga County, after a jury had returned guilty verdicts of aggravated burglary, R.C. 2911.11(A)(3) and grand theft, R.C. 2913.02, against the defendant, Richard Kessler, reduced the aggravated burglary verdict, a felony of the first degree, to one of burglary (R.C. 2911.12), a felony of the second degree. The journal entry simply stated, "[t]he court reduces the first count of aggravated burglary to burglary, R.C. 2911.12," without further explanation or reference to authority.

Relator, prosecuting attorney of Cuyahoga County, is asking the court to compel respondent to vacate the sentence imposed for burglary and sentence according to the penalty provisions for aggravated burglary.

Mr. John T. Corrigan, prosecuting attorney, and *Mr. George J. Sadd*, for relator.

Mr. Floyd Oliver, for respondent.

Per Curiam. Respondent's reason for reducing the aggravated burglary verdict to burglary, as stated in the record made for this court, is that, in his opinion, there is no clear distinction in the statutory definitions of the two crimes. Therefore, respondent says, " * * * that even though the jury found and was instructed as to aggravated burglary, the court can only sentence the defendant under the section for burglary."

As authority for the reduction, respondent points to Crim. R. 33(A) which sets out reasons for a new trial, and, in subsection (4) states that " * * * [i]f the evidence shows the defendant is not guilty of the degree of crime for which he was convicted, but one of a lesser degree thereof," then the court may modify the verdict accordingly without a new trial and sentence on the verdict as modified.

However, there is nothing in the record to indicate that respondent was acting in response to a motion for a new trial. Nor does the record relate the verdict modification to the evidence in the case before respondent as required by Crim. R. 33(A) (4).

Crim. R. 52(B), which permits the court to notice plain errors or defects even though not brought to its attention, is also argued as authority. However, respondent's journal entry does not state any plain errors upon which he relies, nor does the record point to any possible error in the court proceedings, other than respondent's opinion that the definitions of aggravated burglary and burglary are not essentially different.

Respondent's contention of statutory duplication is not relevant, as the record fails to disclose the court's authority to modify the jury's verdict in this case.

Therefore, respondent, not having shown authority to modify the verdict, is under a clear legal duty to sentence according to the verdict returned by the jury.

Writ allowed.

O'NEILL, C. J., HERBERT, CORRIGAN, STERN, CELEBREZZE,
W. BROWN and P. BROWN, JJ., concur.

**Peremptory Writ of Mandamus of the Supreme Court
of Ohio**

(Dated April 21, 1976)

No. 75-1027

THE SUPREME COURT OF THE STATE OF OHIO

STATE OF OHIO, ex rel. JOHN T. CORRIGAN,
Prosecuting Attorney,
Relator,

vs.

GEORGE W. WHITE, Judge
Common Pleas Court,
Respondent.

PEREMPTORY WRIT OF MANDAMUS

STATE OF OHIO, CITY OF COLUMBUS, SS.:

Greeting:

You are hereby served with a copy of the following Writ.

To Hon. George W. White, Judge,

WHEREAS, a petition for a writ of mandamus has been filed in the Supreme Court of Ohio, and an order has been made by said Court allowing a peremptory writ, copy of which hereto attached;

NOW, THEREFORE, In order that full and speedy justice should be done in the premises, we do command you that immediately upon the receipt of this Writ you comply with the order of our said Court herein-before stated.

**Order of the Supreme Court of Ohio Denying Motion
for Rehearing**

(Dated May 13, 1976)

No. 75-1027

THE SUPREME COURT OF THE STATE OF OHIO
THE STATE OF OHIO, CITY OF COLUMBUS.

STATE OF OHIO, ex rel.
JOHN T. CORRIGAN, Prosecuting Attorney,
Relator,
vs.
GEORGE WHITE, Judge,
Respondent.

It is ordered by the court that rehearing in this case
is denied.

**Notice of Appeal to the Supreme Court of the
United States**

(Filed in the Supreme Court of Ohio May 26, 1976)

No. 75-1027

IN THE SUPREME COURT OF OHIO

In Mandamus

THE STATE OF OHIO on Relation of
JOHN T. CORRIGAN, Prosecuting Attorney
of Cuyahoga County, Ohio,
Relator,

vs.

THE HONORABLE GEORGE W. WHITE,
Judge of the Court of Common Pleas
of Cuyahoga County, Ohio,
Respondent.

NOTICE OF APPEAL

Now comes the respondent, by and through counsel,
Floyd B. Oliver, Ann Aldrich and Jeffrey H. Olson, and
respectfully notifies this Honorable Court that he is ap-
pealing this Court's decision of May 13, 1976, denying re-
spondent's motion for rehearing and thus instituting this
Court's order of April 21, 1976 allowing a Writ of Man-
damus to issue against the respondent. Said appeal to the

Supreme Court of the United States will be taken pursuant to Title 28 U.S.C. § 1257(2).

Respectfully submitted,

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Cleveland, Ohio 44115
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PROOF OF SERVICE

A copy of the foregoing Notice of Appeal was mailed, postage prepaid, this 25th day of May, 1976, to John T. Corrigan, Cuyahoga County Prosecutor, at his office in the Criminal Courthouse at 1560 East 21st Street, Cleveland, Ohio, 44114.

/s/ JEFFREY H. OLSON

Journal Entry of the Court of Common Pleas

(Dated September 19, 1975)

No. CR 19576

IN THE COURT OF COMMON PLEAS

STATE OF OHIO,)
)
) ss.
Cuyahoga County)

STATE OF OHIO,
Plaintiff,
vs.
RICHARD KESSLER,
Defendant.

INDICTMENT Aggravated Burglary w/c Grand Theft

JOURNAL ENTRY

This day again comes the Prosecuting Attorney on behalf of the State and defendant Richard Kessler was brought into Court, represented by counsel and the Jury duly impaneled and sworn.

The Jury having heard the testimony adduced, the arguments of counsel and the charge of the Court, alternate jurors dismissed, retired to their room in charge of the Bailiff for deliberation.

Now comes the Jury conducted into Court by the Bailiff and returned the following verdict, in writing, to-wit: "We, the Jury, do find the defendant, Richard Kessler, guilty of Aggravated Burglary, RC 2911.11 as charged

in the first count of the indictment," and "We, the Jury do find the defendant, Richard Kessler, guilty of Grand Theft, RC 2913.02 of value of \$150.00 or more, as charged in the second count of the indictment."

The Court reduces the first count of Aggravated Burglary to Burglary, RC 2911.12.

Thereupon, the Court informed the defendant of the verdict of the Jury and inquired of him if he had anything to say why judgment should not be pronounced against him; and having nothing but what he had already said and showing no good and sufficient cause why judgment should not be pronounced:

It is therefore, ordered and adjudged by the Court that defendant Richard Kessler be imprisoned and confined in the Chillicothe Correctional Institute, Chillicothe, Ohio, for not less than four (4) years nor more than fifteen (15) years on the first count and for not less than two (2) years nor more than five (5) years on the second count of the indictment. Counts to run consecutively. Defendant to pay the cost of this prosecution for which execution is awarded.

The Court advised the defendant of his right to Appeal.

The defendant informs the Court that he can afford his own Attorney.

Supplemental Journal Entry of the Court of Common Pleas

(Dated April 26, 1976)

Case No. CR. 19576

**IN THE COURT OF COMMON PLEAS
CUYAHOGA COUNTY, OHIO**

**STATE OF OHIO,
Plaintiff,**

vs.

**RICHARD KESSLER,
Defendant.**

SUPPLEMENTAL JOURNAL ENTRY

JUDGE WHITE

The Court, pursuant to the authority of OHIO R. CRIM. P. 36, and the mandate of the Supreme Court of Ohio, *State ex rel. Corrigan v. White*, 46 Ohio St. 2d 29 (1976), hereby amends by way of supplement the journal entry of conviction in the instant case as follows, in substitution for the fourth paragraph of the Court's journal entry found at Journal 260, Page 254.

The Court reduces the defendant's conviction under the first count in the indictment from aggravated burglary, OHIO REV. CODE § 2911.11(A)(3), to burglary, OHIO REV. CODE § 2911.12(A), pursuant to the authority of OHIO R. CRIM. P. 52(B). The Court takes this action on the grounds that the defendant, Richard Kessler, was indicted and convicted under OHIO REV. CODE § 2911.11(A)(3),

which is violative of the equal protection clause of the Fourteenth Amendment to the United States Constitution.

It is clear that subsection (A)(3) of the aggravated burglary statute, under which the defendant was convicted, is an effective duplication of the burglary statute. Both sections proscribe the same conduct and yet aggravated burglary is a first degree felony, while burglary is a second degree felony. Thus, for committing identical, prohibited acts, one defendant can be charged, convicted and sentenced for a first degree felony, under aggravated burglary, while another defendant could be charged, convicted and sentenced for a second degree felony, under burglary.

OHIO REV. CODE § 2911.11 (A)(3) (aggravated burglary), provides in pertinent part that no person "... shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code. . ." when

- (3) The occupied structure involved is the permanent or temporary habitation of any person in which at the time any person is present or likely to be present.

OHIO REV. CODE § 2911.12 (burglary), provides in pertinent part that no person "... shall trespass in an occupied structure as defined in section 2901.01 of the Revised Code. . ."

OHIO REV. CODE § 2901.01, as it applies to both burglary and aggravated burglary, defines an occupied structure in such a way as to duplicate for purposes of burglary the very same prohibition as found in subsection (A)(3) of aggravated burglary. Thus, the defendant stands guilty of committing one criminal act, which is prohibited by two statutes, both proscribing factually identical conduct, yet carrying different penalties, with no ra-

tional directive as to which statute should be enforced against this particular defendant. Such a situation cannot exist in consonance with the Fourteenth Amendment. See e.g. *Yick Wo v. Hopkins*, 118 U.S. 356 (1886); *State v. Zornes*, 469 P.2d 552 (Wash. Supreme Court, 1970); *Roush v. White*, 389 F. Supp. 396 (N.D. Ohio, 1975)

Therefore, the Court has no choice but to reduce the instant conviction to burglary, in that the evidence clearly established, and the jury so found, that the defendant had committed acts proscribed by OHIO REV. CODE § 2911.12. This result is necessitated not only by constitutional considerations, but further by the directive of OHIO REV. CODE § 2901.04(A), which mandates that the penal laws shall be strictly construed against the State and liberally construed in favor of the defendant. *Harrison v. Ohio*, 112 Ohio St. 429 (1925) aff'd per curiam 270 U.S. 632; *State ex rel. Moore Oil Co. v. Dauben*, 99 Ohio St. 406 (1919).

While at no time during the course of the instant proceedings did the defendant raise the issue of the constitutionality of OHIO REV. CODE § 2911.11(A)(3), the Court, pursuant to OHIO R. CRIM. P. 52(B), must take notice of this plain error, which can be traced from the issuance of the indictment against the defendant through the jury's return of the conviction under that section. Any other action by this Court would result in a deprivation of the defendant's right to equal protection of the law. Therefore, by this Court's obligation under the Fourteenth Amendment to the United States Constitution, and its authority under OHIO R. CRIM. P. 52(B), the defendant's conviction under the first count of the indictment is reduced to a conviction for burglary OHIO REV. CODE § 2911.12, and the defendant will be sentenced accordingly.

/s/ GEORGE W. WHITE
GEORGE W. WHITE, Judge

**Amended Journal Entry of the Court of
Common Pleas**
(Dated July 15, 1976)

Case No. CR. 19576

IN THE COURT OF COMMON PLEAS
OF CUYAHOGA COUNTY, OHIO

STATE OF OHIO,
Plaintiff,

vs.

RICHARD KESSLER,
Defendant.

JUDGE WHITE

AMENDED JOURNAL ENTRY

The Court, pursuant to the order of the Supreme Court of Ohio rendered on April 21, 1976 by writ of mandamus, hereby amends its Supplemental Journal Entry of April 28, 1976 as follows:

On September 19, 1975, the defendant was convicted by a jury of one count of aggravated burglary, OHIO REV. CODE ANN. §2911.11(A) (3), and one count of grand theft, OHIO REV. CODE ANN. §2913.02. At the time of sentencing, upon the Court's own motion, the conviction of aggravated burglary was reduced to burglary, OHIO REV. CODE ANN. §2911.12, based upon the unconstitutional duplication of offenses found in the burglary and aggravated burglary statutes, as reflected in the transcript of the sentencing proceedings. The defendant was thereupon sentenced to

imprisonment for a period of not less than four (4) years nor more than fifteen (15) years for the conviction of burglary, and not less than two (2) years nor more than five (5) years for the grand theft conviction, said periods to run consecutively.

On November 7, 1975, John T. Corrigan, the Cuyahoga County Prosecutor, petitioned for a writ of mandamus against this Court in the Supreme Court of Ohio, praying that this Court be ordered to resentence the defendant pursuant to the original conviction for aggravated burglary, based upon the Prosecutor's belief that OHIO REV. CODE ANN. §2911.11(A) (3) was not unconstitutional.

On April 21, 1976, the Supreme Court of Ohio rendered a decision issuing a writ of mandamus, *State ex rel. Corrigan v. White*, 46 Ohio St.2d 29 (1976), based upon the fact that this Court had failed to state in its original Journal Entry its authority for the reduction of the defendant's conviction. As a result of this decision, and pursuant to the authority granted by OHIO R. CRIM. PRO. 36, this Court issued a Supplemental Journal Entry on April 28, 1976, in which this Court detailed its reliance upon the authority granted by OHIO R. CRIM. PRO. 52(B) to *sua sponte* notice and remedy plain error, in conjunction with the express mandate of the equal protection clause of the Fourteenth Amendment. On the basis of the Supplemental Journal Entry, which in no way modified the results of this Court's original action, a motion for rehearing was filed in the Supreme Court of Ohio which set forth the primary obligation upon this Court to comply with the Fourteenth Amendment, as found in the supremacy clause, UNITED STATES CONST. Art. VI, cl. 2, in conjunction with the grant of the judicial power to this Court found in OHIO CONST. Art. IV, §1.

On May 13, 1976, the Supreme Court of Ohio denied this Court's motion for rehearing without opinion, despite the above cited authority. On May 26, 1976, this Court filed a notice of appeal in the Supreme Court of Ohio expressing its intent to appeal that Court's order, issuing a writ of mandamus, to the Supreme Court of the United States.

On June 10, 1976, the Supreme Court of the United States, per Mr. Justice Stewart, denied this Court's application for a stay of the order of the Supreme Court of Ohio pending appeal. As a result, this Court has no choice but to comply with the writ of mandamus and sentence the defendant pursuant to a conviction for aggravated burglary, OHIO REV. CODE ANN. §2911.11(A) (3).

Therefore, this Court vacates its reduction of the defendant's conviction from aggravated burglary to burglary, reinstates the conviction of aggravated burglary, and resentences the defendant to a period of imprisonment of not less than four (4) years nor more than twenty-five (25) years, said sentence to be served consecutively with the previously imposed sentence for grand theft.

/s/ GEORGE W. WHITE
GEORGE W. WHITE, Judge

Indictments of Richard Kessler for Aggravated Burglary and Grand Theft

Case No. 19576

CUYAHOGA COUNTY COMMON PLEAS

THE STATE OF OHIO
vs.
RICHARD KESSLER

A TRUE BILL INDICTMENT FOR AGGRAVATED
BURGLARY R.C. 2911.11 w/ct GRAND THEFT
R.C. 2913.02

Date of Offense March 18, 1975

THE STATE OF OHIO)
) SS.
CUYAHOGA COUNTY)

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely and by force, stealth, or deception trespassed in an occupied structure as defined in Section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with the purpose to commit therein a theft offense as defined in Section 2913.01 of the Revised Code, or a felony, and the occupied structure involved is the permanent or temporary habitation of Carol Mueller,

in which at the time she was present or likely to be present, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ RODMAN M. DOUGLAS
Foreman of the Grand Jury

/s/ JOHN T. CORRIGAN
Prosecuting Attorney.

CUYAHOGA COUNTY COMMON PLEAS

THE STATE OF OHIO
vs.
RICHARD KESSLER

A TRUE BILL INDICTMENT FOR GRAND THEFT
R.C. 2913.02

Date of Offense March 18, 1975

THE STATE OF OHIO)
) SS.
CUYAHOGA COUNTY) :

The Jurors of the Grand Jury of the State of Ohio, within and for the body of the County aforesaid, on their oaths, IN THE NAME AND BY THE AUTHORITY OF THE STATE OF OHIO, Do find and present, that the above named Defendant(s), on or about the date of the offense set forth above, in the County of Cuyahoga, unlawfully and purposely did obtain or exert control over 2 guns, jewelry, television, stereo and money with the purpose to deprive the owner, Carol Mueller, of said property or services, without the consent of the owner or person authorized to give consent.

The value of said property or services being \$150.00 or more.

contrary to the form of the statute in such case made and provided, and against the peace and dignity of the State of Ohio.

/s/ RODMAN M. DOUGLAS
Foreman of the Grand Jury

/s/ JOHN T. CORRIGAN
Prosecuting Attorney.

APPENDIX B**United States Constitution and Statutes**

UNITED STATES CONST. Art. VI, cl. 2 provides:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land, and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

UNITED STATES CONST. AMEND. XIV, §1 provides in pertinent part:

... nor shall any state . . . deny to any person within its jurisdiction the equal protection of the laws.

18 U.S.C. §1257 provides in pertinent part:

State courts—Appeal—Certiorari.—Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court as follows:

. . .
 (2) By appeal, where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity.

. . .

APPENDIX C**Ohio Constitution, Statutes and Rules of Court**

OHIO CONST. Art. IV, §1 provides:

Vesting of judicial power.

The judicial power of the state is vested in a supreme court, courts of appeals, courts of common pleas, and such other courts inferior to the supreme court as may from time to time be established by law.

OHIO CONST. Art. IV, §2(B)(1) provides:

The supreme court shall have original jurisdiction in the following:

. . .
 (b) Mandamus;

. . .

OHIO REV. CODE ANN. §2731.02 provides:

The writ of mandamus may be allowed by the supreme court, . . . and shall be issued by the clerk of the court in which application is made. Such writ may issue on the information of the party beneficially interested.

Such writ shall contain a copy of the petition, verification, and order of allowance.

OHIO REV. CODE ANN. §2731.03 provides:

The writ of mandamus may require an inferior tribunal to exercise its judgment, or proceed to the discharge of any of its functions, but it cannot control judicial discretion.

OHIO REV. CODE ANN. §2731.05 provides:

The writ of mandamus must not be issued when there is a plain and adequate remedy in the ordinary course of the law.

OHIO REV. CODE ANN. §2909.01 provides:

Definitions. As used in sections 2909.01 to 2909.07 of the Revised Code, an "occupied structure" is any house, building, outbuilding, watercraft, aircraft, railroad car, truck, trailer, tent, or other structure, vehicle, or shelter, or any portion thereof, to which any of the following applies:

(A) Which is maintained as a permanent or temporary dwelling, even though it is temporarily unoccupied, and whether or not any person is actually present;

(B) Which at the time is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present;

(C) Which at the time is specifically adapted for the overnight accommodation of any person, whether or not any person is actually present;

(D) In which at the time any person is present or likely to be present.

OHIO REV. CODE ANN. §2911.11 provides:

Aggravated burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined

in section 2913.01 of the Revised Code, or any felony, when any of the following apply:

(1) The offender inflicts, or attempts or threatens to inflict physical harm on another;

(2) The offender has a deadly weapon or dangerous ordnance as defined in section 2923.11 of the Revised Code on or about his person or under his control;

(3) The occupied structure involved is the permanent or temporary habitation of any person, in which at the time any person is present or likely to be present.

(B) Whoever violates this section is guilty of aggravated burglary, a felony of the first degree.

OHIO REV. CODE ANN. §2911.12 provides:

Burglary.

(A) No person, by force, stealth, or deception, shall trespass in an occupied structure as defined in section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof, with purpose to commit therein any theft offense as defined in section 2913.01 of the Revised Code, or any felony.

(B) Whoever violates this section is guilty of burglary, a felony of the second degree.

OHIO REV. CODE ANN. §2913.02 provides:

Theft

(A) No person, with purpose to deprive the owner of property or services, shall knowingly obtain or exert control over either:

- (1) Without the consent of the owner or person authorized to give consent;
- (2) Beyond the scope of the express or implied consent of the owner or person authorized to give consent;
- (3) By deception;
- (4) By threat.

(B) Whoever violates this section is guilty of theft. If the value of the property or services stolen is less than one hundred fifty dollars, violation of this section is petty theft, a misdemeanor of the first degree. If the value of the property or services stolen is one hundred fifty dollars or more, or if the property stolen is any of the property listed in section 2913.71 of the Revised Code, or if the offender has previously been convicted of a theft offense, then violation of this section is grand theft, a felony of the fourth degree.

OHIO REV. CODE ANN. §2929.11 provides in pertinent part:

Penalties for felony

* * *

(B) Terms of imprisonment for felony shall be imposed as follows:

- (1) For a felony of the first degree, the minimum term shall be four, five, six, or seven years, and the maximum term shall be twenty-five years;
- (2) For a felony of the second degree, the minimum term shall be two, three, four, or five years, and the maximum term shall be fifteen years.

OHIO R. CRIM. PRO. 36 provides:

Clerical Mistakes

Clerical mistakes in judgments, orders, or other parts of the record, and errors in the record arising from oversight or omission, may be corrected by the court at any time.

OHIO R. CRIM. PRO. 52 provides in pertinent part:

* * *

(B) Plain error

Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.

APPENDIX D**Transcript of Sentencing of Richard Kessler**

THE STATE OF OHIO,)
) SS:
)
 COUNTY OF CUYAHOGA.)

Case No. 19,576

IN THE COURT OF COMMON PLEAS
 CRIMINAL BRANCH

THE STATE OF OHIO,
Plaintiff,
 vs.
 RICHARD KESSLER,
Defendant.

PLAINTIFF'S TRANSCRIPT OF PROCEEDINGS

BE IT REMEMBERED, that at the September, A.D. 1975 Term of said Court, to-wit, on Wednesday, October 22, 1975, this case came on to be heard before the Honorable George W. White, one of the Judges of said Court, upon the indictment filed herein, and the following proceedings were had:

Wednesday, October 22, 1975

[3] THE COURT: This is Case No. 19,576, the State of Ohio versus Richard Kessler.

On September 18th a jury found the Defendant Richard Kessler guilty of aggravated burglary, Revised Code Section 2911.11, under the first count of the indictment,

and guilty of theft, Revised Code 2913.02 of the value of \$150 or more under the second count of the indictment.

The Court in sentencing reduced the first count to burglary under 2911.12, and sentenced the Defendant for not less than four nor more than 15 years under the first count of the indictment to the Chillicothe Correction [sic] Institute.

In this case the Defendant was indicted for aggravated burglary, Revised Code 2911.11, and the indictment stated the date of the offense as March 18, 1975, and it reads as follows:

"The jurors of the Grand Jury of the State of Ohio within and for the body of the County aforesaid, on their oaths, in the name and by the authority of the State of Ohio do find and present that the above-named Defendant, on or about the date of the offense set forth above in the County of Cuyahoga, unlawfully [4] and purposely and by force, stealth or deception trespassed in an occupied structure as defined in Section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof with the purpose of committing therein a theft offense as defined as Section 2913.01 of the Revised Code, or a felony, and the outlined structure involved is the permanent or temporary habitation of Carol Mueller, in which at the time she was present or likely to be present."

Under the burglary section, 2911.12 the Court is reminded that it reads that:

"No person by force or stealth or deception shall trespass in an occupied structure as defined in Section 2909.01 of the Revised Code, or in a separately secured or separately occupied portion thereof with the purpose to commit

therein any theft offense as defined in Section 2913.01 of the Revised Code, or any felony."

The only difference between burglary and aggravated burglary is the specifications that are found in 2911.11, which are as follows:

One: The offender inflicts or attempts or threatens to inflict physical harm on another. The Defendant is not charged with that specification in [5] this case.

Two: The offender has a deadly weapon or dangerous ordnance as defined in Section 2923.11 of the Revised Code on or about his person or under his control. The Defendant is not charged with that specification in this case under aggravated burglary.

Three: The occupied structure involved is the permanent or temporary habitation of any person in which at the time any person is present or likely to be present. The Defendant is charged under that specification in this case.

When we look at the burglary section it defines "occupied structure" under 2909.01. As the Court looks at 2909.01 of the Revised Code, it reads as follows:

"As used in Section 2909.01 to 2909.07 of the Revised Code, an occupied structure is any house, building, out-building, watercraft, aircraft, railroad car, truck, trailer, tent or other structure, vehicle or shelter or any portion thereof to which any of the following applies:

"A: Which is maintained as the permanent or temporary dwelling, even though it is temporarily unoccupied, and whether or not any person is actually present.'

[6] "B: Which at the time is occupied as the permanent or temporary habitation of any person, whether or not any person is actually present.'

"C: Which at the time is specifically adapted for the overnight accommodation of any person, whether or not any person is actually present.'

"D: In which at the time any person is present or likely to be present."

It seems to this Court that the definition of "burglary" under the burglary section of an occupied structure as it is outlined in the indictment in aggravated burglary, is no different than the definition of "burglary" as the Court has just defined it. Therefore, it was the Court's position that even though the jury found and was instructed as to aggravated burglary, the Court can only sentence the Defendant under the section for burglary.

The Court is making this record at the request of Assistant Prosecutor Mr. George Sadd because I believe the Prosecutor's Office wishes to test the ruling of this Court, and the Court is very happy for it to be tested.

MR. SADD: Yes, that's correct, your Honor.

May I please have the indictment at this [7] time?

THE COURT: Yes.

MR. SADD: Your Honor, what you have indicated is a correct summary of the facts preceding in this case; however, I would like to have some additional observations on the record.

The case number, as you have correctly indicated, CR 19,576, the State of Ohio versus Richard Kessler.

Mr. Kessler, the Defendant, was indicted on April 24, 1975; he was indicted, as this Court has indicated, for aggravated burglary pursuant to Revised Code 2911.11 (A)(3), and also for grand theft pursuant to Revised Code 2913.02.

That grand theft indictment alleges that the Defendant on March 18, 1975, did obtain or exert control over two guns, jewelry, television, stereo and money with the purpose to deprive the owner, Carol Mueller, of said property or services without the consent of the owner or person authorized to give consent, and the value of said property or services being \$150 or more.

Now, on May 7, 1975, Richard Kessler was arraigned and he entered a plea of not guilty. The case was assigned to the Honorable George W. White [8] and the case was brought to trial on September 17, 1975.

On September 18, 1975, a jury returned verdicts of guilty against the Defendant with respect to both counts.

It was at that time that this Court, using the reasoning applied previously to this record, reduced on his own motion the count of aggravated burglary to straight burglary, for the reasons cited by this Court on the record.

Your Honor, we respectfully disagree with your conclusion, and it is our intention to test this by way of mandamus in the Supreme Court of Ohio, since we have no plan [sic] or adequate remedy at law.

We feel that the definition of aggravated burglary as contained in 2911.11 (A)(3) means that the occupied structure involved is the permanent or temporary habitation of any person in which at the time any person is present or likely to be present.

We feel that is a specification, an enumeration of an occupied home by the Legislature.

Now, when we look at 2911.12, burglary, and we look more particularly at the legislative comments which follow that section, it reads as follows—these are the legislative notes that I am referring to or quoting—this section defines

a [9] lesser included offense to aggravated burglary by employing the basic elements of the more serious offense but without the specific elements of inflicting or threatening injury or being armed or that the structure involved is a home.

Even without the additional elements, the offense is viewed as serious because of the higher risk of potential harm involved in maliciously breaking and entering an occupied, as opposed to an unoccupied, structure.

Those are the notes that follow 2911.12.

We feel that before the new Ohio Code was enacted, that the penalty for breaking into someone's home was life imprisonment, and that with mercy it became five to 30 years.

We feel that a man's home is his castle and that the Legislature recognized that when it decided to impose upon people breaking into other's homes the element of aggravated burglary, being a felony of the first degree, and not burglary, a felony of the second degree.

Now, this Court has mentioned that it has read 2909.01, the definition of "occupied structure," which is found in a chapter entitled, "Arson and Related Offenses." And, the Court has indicated and [10] read the definition as used in Sections 2909.01 to 2909.07 of the Revised Code:

"An occupied structure is any house, building, out-building, watercraft, aircraft, railroad car, truck, trailer, tent or other structure, vehicle or shelter or any portion thereof to which any of the following applied—"

I say at this time, your Honor, that is the definition of occupied structure. The definitions of A, B, C and D which follow in 2909.01 only apply to the crimes enumerated in Sections 2909.02 to 2909.07, which would be aggra-

vated arson, arson, disrupting public services, vandalism, criminal damaging or endangering and criminal mischief.

We feel that there is a distinction between the two sections, that the distinction in my mind, your Honor, and with all due respect, that the Legislature did specifically enumerate an occupied home and aggravated burglary to be a higher crime than simply burglary.

It is for this reason that on September 26th, when we first learned of this decision of the Court, that I had asked you at that time to give me permission to make a record, and at that time I told you that we were considering taking this case before [11] the Ohio Supreme Court; because, we feel by your definition in effect that you have declared Ohio Revised Code Section 2911.11 unconstitutional as to the penalty aspect.

THE COURT: By my interpretation.

MR. SADD: By your interpretation.

So, we wish to test it. I know this Court wishes to test it, too, and I thank you for the opportunity to make a record so that I can present it to the Ohio Supreme Court.

We feel we must do this in mandamus, and for the record I will ask you:

Will this Court change its mind and reinstate the penalty of aggravated burglary against Richard Kessler?

THE COURT: Before answering that question, again the Court would like to reiterate under the burglary section it says:

"No person by force, stealth or deception shall trespass in an occupied structure as defined in Section 2909.01."

And even there—and the Court agrees, it refers in 2909.01 to sections used in 2909.01 to 2909.07, which would seem to eliminate even the section that 2911.12 refers. And I think maybe the [12] Legislature made a mistake there, also.

But, in any event, burglary does refer to the 2909.01 definition of an occupied structure, and it is this Court's feeling that it wants to have this tested so that if this Court is right the Legislature can change the wording of these sections and we can get it straightened out now.

If the Court is wrong in its interpretation it would like to know so that it will not interpret it or make that kind of interpretation in further cases, as it is still doing.

It might be noted that in this case and in other related cases the Court does feel that the Legislature intended what Mr. Sadd is saying they intended, but I don't think the statutes are worded that way; and the definition isn't worded that way, and I think this Court must strictly construe criminal statutes.

But it might be noted that this Court in this case applied a higher than minimum maximum sentence in this case; where it could have imposed a penalty of two to 15, or three to 15, or four to 15, or five to 15, the Court, because of that feeling of what the Legislature intended, made the penalty not less than four nor more than 15 in this case, four being the [13] minimum in this case, and also it made the penalty that way because of the record that the Court had before it of this Defendant, and I appreciate the Prosecutor taking this approach to the case.

MR. SADD: I must ask again, for the record, your Honor.

THE COURT: This Court does intend to keep on, and it has been, where these specifications call for an occupied structure, has been taking the position that it is—should be sentenced at least under the burglary section.

MR. SADD: I ask this Court once again, would this Court change its sentencing and sentence Richard Kessler to the aggravated burglary.

THE COURT: No. The answer is no.

MR. SADD: Then you leave us no choice but to file a mandamus.

THE COURT: Fine I appreciate your doing this.

Supreme Court of the United States

October Term, 1976
No. 76-194

SEP 7 1976
MICHAEL RODAK, JR., CLERK

THE HONORABLE GEORGE W. WHITE, Judge of the
Court of Common Pleas of Cuyahoga County,
Appellant,

vs.

THE STATE OF OHIO on Relation of JOHN T.
CORRIGAN, Prosecuting Attorney of Cuyahoga
County, Ohio,
Appellee.

ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OHIO

MOTION TO DISMISS

JOHN T. CORRIGAN, *Prosecuting Attorney
of Cuyahoga County, Ohio*

GEORGE J. SADD
*Assistant Prosecuting Attorney
Justice Center
1200 Ontario Street
Cleveland, Ohio 44113
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ANN ALDRICH
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Supreme Court of the United States

October Term, 1976

No. 76-194

THE HONORABLE GEORGE W. WHITE, Judge of the
Court of Common Pleas of Cuyahoga County,
Appellant,

vs.

THE STATE OF OHIO on Relation of JOHN T.
CORRIGAN, Prosecuting Attorney of Cuyahoga
County, Ohio,
Appellee.

**ON APPEAL FROM THE SUPREME COURT OF THE
STATE OF OHIO**

MOTION TO DISMISS

STATEMENT OF FACTS

On April 24, 1975, the Grand Jury of Cuyahoga County, Ohio, indicted Richard Kessler for the crimes of aggravated burglary, pursuant to Ohio Revised Code, Section 2911.11(A)(3), and grand theft, pursuant to Ohio Revised Code, Section 2913.02.

On May 7, 1975, Richard Kessler was arraigned, and at that time, entered a plea of not guilty to both charges. The case, designated as CR 19576 was assigned to the Honorable George W. White.

On September 17, 1975, the case was brought to trial and on September 18, 1975, the Honorable George W. White charged the jury relative to the crimes of aggra-

vated burglary and grand theft. On the same day, the jury returned verdicts of guilty against the defendant Kessler with respect to both counts of the indictment.

On September 18, 1975, Judge George W. White, at the time of Kessler's sentencing, refused to sentence the defendant under aggravated burglary, the crime for which he was found guilty, and instead, sentenced him under the burglary statute, Ohio Revised Code, Section 2911.12. Judge White based his actions on his personal belief that no difference exists between aggravated burglary, Ohio Revised Code, Section 2911.11(A)(3) and burglary, Ohio Revised Code, Section 2911.12. Judge White observed:

"It seems to this Court that the definition of 'burglary' under the burglary section of an occupied structure as it is outlined in the indictment in aggravated burglary, is no different than the definition of 'burglary' as the Court has just defined it. Therefore, it was the court's position that even though the jury found and was instructed as to aggravated burglary, the Court can only sentence the defendant under the section for burglary." (A29)

By his actions, Judge White unilaterally, without a motion by defendant Kessler, struck down as unconstitutional, the aggravated burglary statute, that is, Ohio Revised Code, Section 2911.11(A)(3).

Despite pleas by the Assistant Prosecuting Attorney to change his views, Judge White stated that he would continue in the future to sentence individuals convicted of aggravated burglary under the provisions of burglary, Ohio Revised Code, Section 2911.12.

Judge White refused to sentence defendant Kessler for the crime of aggravated burglary for which he was

convicted, and instead sua sponte, reduced the aggravated burglary verdict on his own motion to the lesser charge of burglary, Ohio Revised Code, Section 2911.12. Judge White proceeded to sentence Kessler under the burglary section, *a crime Kessler was not convicted of*.

On November 6, 1975, a mandamus action was filed in the Ohio Supreme Court by the Prosecuting Attorney of Cuyahoga County requesting that the Ohio Supreme Court issue a writ of mandamus compelling appellant to sentence Kessler for the crime he was convicted of.

On April 21, 1976, the Ohio Supreme Court issued a writ of mandamus against the appellant, stating:

"Therefore, respondent, not having shown authority to modify the verdict, is under a clear legal duty to sentence according to the verdict returned by the jury. Writ allowed." (Emphasis added) (A4)

On April 28, 1976, appellant Judge White, seven days after the writ of mandamus was allowed, issued a supplemental journal entry (A11).

On April 30, 1976, appellant Judge White, filed in the Ohio Supreme Court a motion for rehearing.

On May 4, 1976, the Prosecuting Attorney of Cuyahoga County opposed the motion for rehearing.

On May 13, 1976, the Ohio Supreme Court denied the motion for rehearing (A6).

On May 26, 1976, a Notice of Appeal to the Supreme Court of the United States was filed (A7).

On July 15, 1976, after appellant's request for stay of the order of the Supreme Court of Ohio pending appeal was denied, per Mr. Justice Stewart, Kessler was resentenced by the appellant for the crime of aggravated burglary (A14).

**THE APPELLANT'S APPEAL PURSUANT TO TITLE
28 U.S.C., SECTION 1257(2) MUST BE DISMISSED
FOR LACK OF A SUBSTANTIAL FEDERAL
QUESTION.**

Appellant's contentions are unmeritorious. Therefore, pursuant to Rule 16(1)(b) of the Rules of the United States Supreme Court, appellee moves this Court to dismiss appellant White's appeal for lack of a substantial federal question, and because the judgment of the Ohio Supreme Court rests on an adequate non-federal basis. Rule 16(1)(b) provides:

"The Court will receive a motion to dismiss an appeal from a state court on the ground that it does not present a substantial federal question; or that the federal question presented to be reviewed was not timely or properly raised, or expressly passed on; or that the judgment rests on an adequate non-federal basis."

It is well established that in cases emanating from state courts, the Supreme Court will not review state court judgments if it appears that state court judgments rest on an independent non-federal ground adequate to support it. See, *Johnson v. State of New Jersey*, 384 U.S. 719, 735, 736 (1966); *Black v. Cutter Laboratories*, 351 U.S. 292, 297, 298 (1956). Thus, state procedural regulations which satisfy due process bar review by the United States Supreme Court.

Since the decision of the Ohio Supreme Court in this case relies on an interpretation of Ohio Criminal Rules 33(A) and 52(B) (A3, A25), and these rules have not been challenged as violative of due process, the Ohio Supreme Court's decision in this case rests on adequate state grounds and no substantial federal question is presented for review.

Therefore, both issues raised by appellant should be dismissed for failure to raise a substantial federal question.

Furthermore, as to issue one, that issue was never raised in the court below, thus precluding review by the United States Supreme Court. See, *Herndon v. Georgia*, 295 U.S. 441 (1935).

CONCLUSION

Respectfully, it is requested that appellee's motion to dismiss be granted since the Ohio Supreme Court's decision in *State ex rel., John T. Corrigan v. White*, 46 Ohio St. 2d 29 (1976) rests on adequate state grounds and no substantial federal question is presented for review.

Respectfully submitted,

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MICHAEL RODAK, JR., CLERK

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APPELLANT'S BRIEF IN OPPOSITION TO MOTION TO DISMISS

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STATEMENT OF THE CASE

The appellant relies upon, and incorporates herein
by reference, the Statement of the Case contained in the
Jurisdictional Statement.

ARGUMENT

I. THE APPELLEE'S MOTION TO DISMISS FAILS TO ADDRESS ITSELF TO THE JURISDICTIONAL GROUNDS SET FORTH BY THE APPELLANT AND THEREFORE MUST BE DENIED.

In his Motion to Dismiss, the appellee raises two objections to this Court's jurisdiction, the first, that since the appellant has not challenged the Ohio Supreme Court's interpretation of OHIO CONST. Art. IV, §1, and OHIO R. CRIM. P. 52(B) on due process grounds, no appeal will lie; and second, that the appellant's first issue presented was not raised below, thus precluding review by this Court.

A. The Appellee's Assertions Regarding Due Process and the Adequacy of the Independent State Grounds for the Decision Below Are Inapposite to the Issues Presented in the Instant Case.

The appellant agrees with the appellee's threshold contention that a state procedural rule which comports with due process and advances a legitimate state interest will not be declared unconstitutional on Fourteenth Amendment due process grounds. *Johnson v. New Jersey*, 384 U.S. 719 (1966); *Henry v. Mississippi*, 379 U.S. 443 (1965). However, the appellee then proceeds to expand upon this doctrine to a point where he claims that the Fourteenth Amendment's due process clause constitutes the only basis for a constitutional challenge to a state law. Then the appellee states that since the appellant has not based his appeal upon due process, no jurisdictional grounds exist. No such constitutional mandate has ever been handed down by this Court, and innumerable decisions exist to the contrary. See e.g., *Yick Wo v. Hopkins*, 118 U.S. 356 (1886).

The appellant has challenged the constitutionality of the Ohio Supreme Court's interpretation of OHIO CONST. Art. IV, §1, and OHIO R. CRIM. P. 52(B) under the supremacy clause, UNITED STATES CONST. Art. VI, cl. 2, which raises considerations vastly different from the principles of due process discussed in *Johnson v. New Jersey*, *supra*, and *Black v. Cutter Laboratories*, 351 U.S. 292 (1956), cited by the appellee. These two cases neither affect in any way the substance of the issues presented for this Court's review, nor do they buttress the appellee's assertion that only the due process clause can be relied upon for jurisdiction in this Court.

By grounding his motion to dismiss upon theories of adequate state grounds under the due process clause, the appellee has apparently confused a defendant's right to due process of law, and the individual guarantees embodied within that concept, with the primary obligation of a state court judge to abide by constitutional mandate. The exercise of a defendant's federal due process rights can be regulated by the state within strict constitutional parameters, and those rights can even be knowingly, voluntarily and intelligently waived by the defendant's unilateral decision. However, a judge cannot unilaterally abridge or ignore the duty of fidelity placed upon him by the United States Constitution, nor can the state, by constitution, statute or procedural rule, impede or detract from that judge's ability to fulfill his constitutional obligation. *Cooper v. Aaron*, 358 U.S. 1, 16-19 (1958).

Thus, the appellee's assertions are completely unrelated to the jurisdictional grounds raised by the appellant, and therefore cannot rationally support the contention that this Court is without jurisdiction over the instant case.

B. The Appellee's Assertions Regarding the Timeliness With Which the First Issue Presented Was Raised Are Inapposite to the Instant Case.

The appellee's second submission in support of his motion to dismiss alleges that the appellant failed to raise his first issue presented in a timely fashion. However, it is clear from the facts previously related that this issue was raised at the first opportunity, upon the appellant's motion for reconsideration in the Supreme Court of Ohio, and that this issue was in fact created by the Ohio Supreme Court's first, unprecedented decision in the instant case.

Herndon v. Georgia, 295 U.S. 441 (1935), cited by the appellee, in reality supports the appellant's position. *Herndon* specifically recognized the exception to the general jurisdictional rule herein in issue, *Herndon, supra*, at 443-444, and then held that the facts in that case did not fit within the exception, because the Georgia Supreme Court had issued a similar ruling several months prior to the decision therein being challenged, *Herndon, supra*, at 444-446.

As the appellant has previously stated, the Supreme Court of Ohio's decision in the instant case was without precedent, totally unforeseeable and raised issues not previously addressed by the parties. The appellee has been unable to provide this Court with any authority to the contrary. Therefore, the propriety of the manner in which the appellant has raised this issue cannot be seriously challenged and the issue is not subject to dismissal on the grounds asserted by the appellee.

II. THE APPELLEE HAS FAILED TO CHALLENGE THIS COURT'S JURISDICTION OVER THE APPELLANT'S SECOND ISSUE PRESENTED.

It must be noted that the appellee's two assertions discussed above both appear to be directed to the appellant's first issue presented, thus leaving this Court's jurisdiction over the second issue unchallenged.

CONCLUSION

For the foregoing reasons, the appellant respectfully requests that this Honorable Court deny the appellee's motion to dismiss and accept jurisdiction over the instant appeal.

Respectfully submitted,

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